

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	) File No. EB-08-IH-5318
	) File No. EB-09-IH-1703
<b>BNSF Railway Company</b>	)
	) NAL Acct. No. 201032080013
Licensee of Various Authorizations in the	)
Wireless Radio Services	) FRN No. 0004772877

**CONSENT DECREE**

1. The Enforcement Bureau of the Federal Communications Commission and BNSF Railway Company, by their authorized representatives, hereby enter into this Consent Decree for the purpose of resolving the Enforcement Bureau's investigation of compliance by BNSF Railway Company with Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), and Sections 1.17 and 1.948 of the Commission's Rules, 47 C.F.R. §§ 1.17, 1.948.<sup>1</sup>

**I. DEFINITIONS**

2. For purposes of this Consent Decree, the following definitions shall apply:
- (a) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
  - (b) "Adopting Order" means an order of the Bureau adopting this Consent Decree without any modifications adverse to BNSF Railway Company.
  - (c) "Any" shall be construed to include the word "all," and the word "all" shall be construed to include the word "any." Additionally, the word "or" shall be construed to include the word "and," and the word "and" shall be construed to include the word "or." The word "each" shall be construed to include the word "every," and the word "every" shall be construed to include the word "each."
  - (d) "BNSF" means BNSF Railway Company and its predecessors-in-interest and successors-in-interest.
  - (e) "Bureau" means the FCC's Enforcement Bureau.
  - (f) "Commission" or "FCC" means the Federal Communications Commission.
  - (g) "Effective Date" means the date on which the Bureau releases the Adopting Order.

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<sup>1</sup> On October 16, 2009, the Bureau and BNSF entered into a Tolling Agreement whereby any statute of limitation period that would have expired after October 16, 2009 was tolled upon certain terms and conditions pending resolution of this matter.

- (h) “Final Order” means that, with respect to the Adopting Order: (1) no request for stay or similar request is pending; no stay is in effect; the Adopting Order has not been vacated, reversed, set aside, annulled or suspended; and any deadline for filing such request that may be designated by statute or regulation has passed; (2) no timely petition for rehearing or reconsideration of the Adopting Order, or protest of any kind, is pending before the FCC, and the time for filing any such petition or protest has passed; (3) the FCC does not have the Adopting Order under reconsideration or review on its own motion and the time for such reconsideration or review has passed; and (4) the Adopting Order is not under judicial review, there is no notice of appeal or other application for judicial review pending, and the deadline for filing such notice of appeal or other application for judicial review has passed.
- (i) “Investigations” mean: (1) the Bureau’s investigation relating to whether BNSF engaged in substantial assignments of certain licenses to another entity on November 16, 2007, without seeking or obtaining prior Commission consent, in violation of Section 310(d) of the Act and Section 1.948 of the Commission’s Rules; and (2) the Bureau’s investigation relating to whether BNSF failed to make truthful and accurate statements in certain applications filed with the Commission, in violation of Section 1.17 of the Commission’s Rules.
- (j) “Parties” means the Bureau and BNSF.

## II. BACKGROUND

3. BNSF, a subsidiary of Burlington Northern Santa Fe Corporation, is one of the largest railroads in North America. BNSF employs approximately 40,000 people and operates approximately 6,700 locomotives and an average of 220,000 freight cars on railroad lines covering approximately 32,000 route miles in 28 states and two Canadian provinces. BNSF maintains more than 700 microwave towers, 6,500 antenna structures, and holds nearly 3,500 FCC authorizations for private land mobile, microwave, marine coast and radio location facilities.

4. Section 310(d) of the Act provides that no station license shall be assigned without prior Commission consent. Section 1.948 of the Commission’s Rules establishes a similar prohibition with regard to station licenses in the Wireless Radio Services. On November 16, 2007, BNSF sold its communications system for a portion of railroad track, including the infrastructure and associated FCC licenses, to Montana Rail Link, Inc., a regional railroad company operating in Montana, Idaho, and Washington. The transaction constituted a substantial assignment of a number of land mobile and microwave licenses. BNSF did not file applications seeking Commission consent to the assignment of licenses prior to consummating the transaction. On January 24, 2008, BNSF filed the first of several applications seeking Commission consent to the assignment of the subject licenses. BNSF attributed its failure to timely file such applications to a misunderstanding of the Commission’s licensing processes. BNSF subsequently sought clarification from FCC licensing staff regarding applicable filing requirements and filed further applications pursuant to staff comments. All such applications have since been granted by the Commission’s Wireless Telecommunications Bureau.

5. Section 1.17 of the Commission’s Rules requires all statements made to the Commission to be truthful and accurate. Certain FCC license application forms, including FCC Forms 601 and 603, inquire whether the applicant has ever been convicted of a felony. On December 4, 1998, BNSF entered into a plea agreement filed in the U.S. District Court for the Eastern District of Missouri in St. Louis. Pursuant thereto, the company pled guilty to one felony count and agreed to pay a fine and restitution of \$10 million and to spend another \$9 million in remediation costs for violating the Clean Water Act and

the Comprehensive Environmental Response, Compensation and Liability Act. In the intervening years, BNSF has filed a number of applications on FCC Forms 601 and 603 on which it did not properly disclose its felony conviction. BNSF states that its employees responsible for preparing FCC applications had little or no contact with employees involved in environmental matters and were unaware of BNSF's felony conviction. BNSF states that upon learning of the omitted felony conviction disclosures, BNSF employees responsible for preparing FCC applications voluntarily brought it to the attention of the appropriate BNSF officers and BNSF's outside counsel, and it was promptly disclosed to the Commission.

### III. TERMS OF AGREEMENT

6. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to approval by the Bureau by incorporation of such provisions by reference in the Adopting Order, without change, addition, modification, or deletion.

7. **Jurisdiction.** BNSF acknowledges that the Commission has jurisdiction over the matters contained in this Consent Decree and the authority to enter into and adopt this Consent Decree.

8. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the Effective Date. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other order of the Bureau. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Bureau Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission order.

9. **Termination of Investigations.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its Investigations on the Effective Date. In consideration for the termination of the Investigations, BNSF agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in the Investigation through the Effective Date of the Consent Decree, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against BNSF concerning the matters that were subject of the Investigations. The Bureau also agrees that it will not use the facts developed in the Investigations through the Effective Date of this Consent Decree, or the existence of this Consent Decree, to institute on its own motion, any proceeding, formal or informal, or take any action on its own against BNSF with respect to BNSF's basic qualifications, including its character qualifications to be a Commission licensee or to hold Commission authorizations.

10. **Compliance Plan.** BNSF agrees that it will develop and implement a comprehensive Compliance Plan for the purpose of ensuring its compliance with Section 310(d) of the Act and Sections 1.17 and 1.948 of the Commission's Rules. The Compliance Plan shall include, at a minimum, the following components:

- (a) **Compliance Officer.** Within 60 calendar days of the Effective Date, BNSF will designate a Compliance Officer who will administer the Compliance Plan, supervise BNSF's compliance with the Commission's Rules, and serve as the point of contact on behalf of BNSF for all FCC-related compliance matters.
- (b) **Compliance Manual.** Within 60 calendar days of the Effective Date, the Compliance Officer will develop and distribute a Compliance Manual to employees and others who perform duties at BNSF that trigger or may trigger compliance-related

responsibilities. The Compliance Manual will include (i) an overview of the Commission's requirements, including the need for prior approval for license assignments and transfers of control; (ii) a description of the regulatory requirements applicable to the accurate reporting of information in FCC applications; and (iii) instructions regarding due diligence for FCC applications. The Compliance Manual will be updated from time to time as needed.

- (c) **Compliance Training Program.** Within 90 calendar days of the Effective Date, BNSF will begin administering a Compliance Training Program for employees and others who perform duties at BNSF that trigger or may trigger compliance-related responsibilities. This Compliance Training Program will be presented to new employees who are engaged in such activities, within the first 60 calendar days of employment or as soon as practicable. This Compliance Training Program will track the Compliance Manual, focusing on proper implementation of the Compliance Manual and tailored to specific user groups.
- (d) **Compliance Reports.** BNSF will submit a Compliance Report to the Commission 90 days after the Effective Date and annually thereafter on the anniversary of the Effective Date until the Termination Date. Each Compliance Report will include a certification by the Compliance Officer that BNSF is, and at all times since the previous Compliance Report was submitted has been, in compliance with the terms and conditions of this Consent Decree and with Sections 310(d) of the Act and of 1.17 of the Commission's Rules. If the Compliance Officer is not able to so certify, he shall explain fully the reason(s) therefore. All Compliance Reports shall be directed to the Chief, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.
- (e) **Termination Date.** The requirements relating to the Compliance Plan shall expire 36 months after the Effective Date.

11. **Voluntary Contribution.** BNSF agrees that it will make a voluntary contribution to the United States Treasury in the total amount of \$110,000. The payment shall be made within 30 days after the Effective Date of the Adopting Order. The payment shall be made by check or similar instrument, payable to the Order of the Federal Communications Commission. The payment must include the Account Number and FRN Number referenced in the caption to the Adopting Order. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank Federal Reserve Bank of New York, and account number 27000001. BNSF will also send electronic notification within forty-eight (48) hours of the date of said payment is made to [Hillary.DeNigro@fcc.gov](mailto:Hillary.DeNigro@fcc.gov).

12. **Waivers.** BNSF agrees to waive any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Consent Decree is adopted without change, addition, modification or deletion. BNSF shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party, or the United States on behalf of the Commission, brings a judicial action to enforce the terms of the Adopting Order, neither BNSF nor the Commission shall contest the validity of the Consent decree or the Adopting Order, and BNSF shall waive any statutory right to a trial *de novo*. BNSF hereby agrees to waive any claims it may otherwise

have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

13. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of the Consent Decree to which BNSF does not expressly consent) that provision shall be superseded by such Commission rule or Order.

14. **Successors and Assigns.** BNSF agrees that the terms and conditions of this Consent Decree shall be binding on its successors, assigns, and transferees.

15. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree does not constitute an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders and shall not be construed as an admission by BNSF.

16. **Modifications.** This Consent Decree may not be modified without the advance written consent of both Parties.

17. **Paragraph Headings.** The headings to the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

18. **Authorized Representative.** Each party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

19. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

By: \_\_\_\_\_  
Hillary S. DeNigro  
Chief, Investigations and Hearings Division  
Enforcement Bureau  
Federal Communications Commission

By: \_\_\_\_\_  
James H. Gallegos  
V.P. and Corporate General Counsel  
BNSF Railway Company

Date: \_\_\_\_\_

Date: \_\_\_\_\_